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State Water Resources Control Board
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Closing Brief of the California Sportfishing Protection Alliance [CSPA]
Yuba 2006 Change Petition Hearing

THE HISTORY

What follows is a history of recent fisheries actions on the Yuba. This history shows that the SWRCB (the Board) held hearings that fully examined fishery conditions on the Yuba River and made findings based on substantial evidence that the D-1644 fishery flow regime was “in the public interest.” The public interest review of the Board includes the need to protect fish, wildlife, and the environment. The Board also has public trust authority, and prior decisions such as WR 2002-13-WR 2002-16 (Imperial Irrigation District Water Transfer to San Diego) confirmed that the Board’s review of water transfers is essentially the equivalent of a public trust review. Nothing in the present hearing on the YCWA change petition showed any scientific justification for delaying or changing the beginning date for the D-1644 permanent flow regime on the Yuba River.

CSPA witnesses Jerry Mensch and Dan Odenweller testified in the hearing that their long experience as government scientists working on the Yuba River has convinced them that, for the reasons explained in their testimony, the Accord/Interim flows of the YCWA pilot program are less protective of fish and wildlife than the permanent flows of D-1644. It is highly unlikely that a change from D-1644 is even necessary for the pilot project 2006 transfer, since YCWA testimony is that a change of the flow schedule is only necessary in dry years.

In 2000, the State Water Resources Control Board issued Decision 1644 amending flow regimes and taking other actions on the lower Yuba River (LYR) between Englebright Reservoir and the Feather River. D-1644 was released more than 10 years after the Board held its first hearing regarding a Department of Fish & Game management report on water flow needs on the Yuba River. For those 10 years, the Yuba County Water Agency was able to delay a final decision by the Board and to keep in place a deficient fisheries flow agreement in the Lower Yuba River while selling large amounts of water by transfer to other users.

CSPA participated in the original 1991 Yuba River hearings and provided testimony on fisheries needs in the river. CSPA also participated in the hearings in 1999 and 2002. In its final order in D-1641, the Board made last-minute changes to the order at the request of YCWA that CSPA believes were unsupported by facts or testimony. These changes included elimination of water temperature provisions and reductions in fisheries flow. The Board changes are the subject of a CSPA lawsuit against the Board that is presently awaiting trial in San Joaquin County.

In addition to the CSPA lawsuit, YCWA and some of its member districts also filed a legal challenge to the Board's D-1644 order on a number of different issues. YCWA has continued to make yearly "Temporary Transfers" of Yuba River water to DWR, USBR, and other water users, resulting in profits of millions of dollars to YCWA, while the agency continued to fight the Board's fish flows, which YCWA believed would reduce the amount of water it had available for transfer to other water users. YCWA will receive a payment of \$4,200,000 for 60,000 acre-feet that it will provide for the EWA under the 2006 pilot program.

The instream flow requirements in the proposed Accord Fisheries Agreement will be accelerated to begin in 2006 under the one-year pilot program. The pilot program will allow the

participants in the Yuba Accord to begin to implement the new program while they are working on a joint EIR/EIS, as required by state and federal environmental laws, and while YCWA secures all of the necessary permits and approvals to implement the Yuba Accord. This bifurcation of the whole Accord project into the pilot project and the Accord is unlawful under the California Environmental Quality Act (CEQA) and should not be condoned by the Board. The full environmental review of the Accord is expected by YCWA to be completed in late 2006. The pilot project emerged when it became clear that the environmental review of the Accord could not be completed this year.

The first step in the Accord process was completion of a Statement of Support for the Fisheries Agreement, a Memorandum of Understanding for the Water Purchase Agreement, and Principles of Agreement for the Conjunctive Use Agreements with YCWA's local irrigation districts/mutual water companies. With most of these approvals now in place, parties to the Yuba Accord that also are parties to the D-1644 litigation will soon request that the San Joaquin County Superior Court stay its proceedings while YCWA initiates the environmental compliance process for the Accord required by CEQA, NEPA, and the state and federal ESAs. CSPA is opposing the YCWA request for a stay in the court action since we believe that D-1644 is not perfect and has fall flow and temperature impacts that affect fish. After final completion of the Accord EIR/EIS, the Board will then be asked to take action to implement the Yuba Accord. Chief among the actions required will be a request to eliminate D-1644 high spring flows on the Yuba River.

Another important issue that CSPA believes YCWA and its member districts did not adequately address in their analysis of impacts to fish and wildlife involves the "South Screen." This structure is basically a pile of rocks in a side channel near Daguerre Dam that is supposed to

act as a fish screen. Studies conducted by DFG and NMFS in 2004 documented that this structure does not meet federal fish screen criteria and, due to structural limitations, can never be made to meet those criteria. This structure is an integral part of YCWA's on-going operations on the Yuba and water flows under the pilot program would continue to be diverted at this structure. The pilot project environmental document does not adequately address the inadequacies of the screen and in fact allows for the continued taking of listed fish species in violation of the state CESA and federal ESA.

THE HEARING

The State Water Resources Control Board, Division of Water Rights, is to assist the State of California in establishing and maintaining a stable system of water rights that will best develop, conserve, and utilize in the public interest the water resources of the State while protecting prior rights, water quality and the environment. *United States v SWRCB*, (1986) 182 Cal.App.3rd 82. Transfers of water are governed by Water Code section 1725, which establishes a rule that water transfers must not unreasonably affect fish, wildlife, or instream uses. The Board is required to commence an investigation into the facts of the proposed transfer. Water Code section, 1726 (d), (e). In acting on a petition for a temporary transfer, the Board must evaluate changes in water storage, timing and point of diversion, place and purpose of use, timing and point of return flow, water quality, and instream flows and other changes that are likely to occur as a result of the proposed temporary changes. In the Matter of License 1050, Natomas, WR order 99-12, WR order 2000-01.

In Water Code section 1011(b) the Code states, "Water, or the right to the use of water, the use of which has ceased or been reduced as the result of water conservation efforts as described in subdivision (a), may be sold, leased, exchanged or otherwise transferred pursuant to

any provision of law relating to the transfer of water or water rights, including, but not limited to, provisions of law governing any change in point of diversion, place of use and purpose of use due to the transfer.” It specifies that water conservation shall mean the use of less water to accomplish the same purpose allowed under the existing appropriative right. The water to be transferred by YCWA in this case is not conservation water. This proposed transfer is water that has not been continuously used by YCWA and, after the permanent flows of D-1644 take effect, it is water released for environmental or flood reservation purposes, and therefore is not conserved water available for transfer. For that reason alone, it is not in the public interest for the Board to delay the enforcement of the D-1644 flow standard for this pilot program.

CEQA REVIEW FOR THE HEARING

CSPA reviewed the final Initial Study/Negative Declaration filed by YCWA the day before the hearing for the transfer of water from the Yuba River and has the following comments on those documents: Studies should be conducted and data re-analyzed to identify project-caused impacts to the environment and fish and wildlife as argued in the numbered paragraphs below. In addition, mitigation measures should be included to reduce all impacts to less than significant as required by the California Environmental Quality Act. These comments are germane to the Temporary Change petition and were not answered in either the hearing or the final Initial Study and Negative declaration (IS/ND) filed herein by YCWA (Exhibit 11). Therefore, the IS/ND and the hearing testimony are inadequate for use by the Board to support a delay in D-1644 standards until substantial revision that fairly addresses the following questions occurs:

1. What changes to coldwater and warm water fisheries habitat in New Bullards Bar Reservoir will result from any operational changes in water release quantities and timing?

An analysis of any changes that may result to the legally required or historic minimum pool levels should be completed before anyone can know if fish are affected either in the lake or downstream.

2. What changes will result in daily water temperature in New Bullards Bar Reservoir and in release temperatures? Information necessary for that analysis was not supplied by YCWA to the Board until the day before yesterday, January 22, 2006. The analysis should include projected changes during conditions for dry years such as Water Year 1976-77.
3. What impacts to recreational uses of New Bullards Bar Reservoir will result from the proposed operational changes?
4. What impacts to river water temperatures throughout the year will result from the proposed changes in flow releases to the Yuba River? The environmental document lacks an analysis of temperature impacts from elevated flows during summer months on growth of salmon and steelhead in the Yuba River.
5. What are the impacts to State and Federally listed species from the proposed operational changes and the elevation changes that may occur in the reservoir and downstream reaches of the river?
6. What are the impacts on salmon and steelhead from all unscreened diversions where water for the proposed transfer may be diverted, including in the Sacramento-San Joaquin Delta? The IS/ND does not provide mitigation sufficient to reduce all screen impacts to less than significant levels.
7. What are the impacts of agricultural diversions on water flow and temperature and their impacts on fish populations? All identified effects are required to be mitigated to

less than significant levels. There is no substantial evidence that identified effects have been so mitigated.

8. The pilot program document should have analyzed the impacts of flow and temperature changes in the Yuba River on aquatic resources of the Feather River downstream of the Yuba confluence including any potential impacts to fish migration. It did not do so with the detail required to educate either the decision-maker or the public.
9. The pilot program document should have identified and analyzed potential changes to migration timing and attraction for spawning of American Shad and to any potential impacts to angling for shad on the Yuba River of the pilot program flows. CSPA expert witnesses provided testimony that indicated that the loss of spring flow for shad spawning could be significant, but the issue was brushed aside by the IS/NG.
10. The pilot program document should have analyzed and provided mitigation for the impacts of flow fluctuation on the Yuba River that may occur as a result of the water transfer.
11. The pilot program document should have better analyzed the impact of the Conjunctive Use program for the pilot program on groundwater levels and on wildlife habitat in Yuba County.
12. The document should have fully identified all impacts to aquatic life in the Sacramento-San Joaquin Delta that may result from the transfer and re-diversion from the Delta. Particular emphasis should be placed on the cumulative and additive impacts that could result from other transfers in combination with this project.
13. All impacts should have been identified and analyzed and mitigations provided for the area where the Yuba River transfer water will be used.

14. The document failed to disclose and analyze the loss of fisheries habitat that may occur from reducing spring flows below those provided for in D-1644.

15. The document should have identified the specific flows and ranges of flows that may occur under various water transfer scenarios for 2006.

16. Adding the SWP and CVP as new points of diversion/re-diversion for the pilot program water could have significant adverse impacts to fisheries of the Delta, as the Delta diversions do not have in place fish screens which meet state and federal agency screening criteria. These Delta impacts should be identified, quantified and mitigated to less than significant as required by CEQA. The IS/ND does not do this.

THE HEARING TESTIMONY (WITHOUT TRANSCRIPTS)

CSPA's expert witnesses, Jerry Mensch and Dan Odenweller, (CSPA 1,2,3,4) collectively pointed out in their testimony that the YCWA 2006 water transfer would have an unreasonable effect on fish and wildlife in the Yuba River for five reasons:

1. "While the RD 1644 Long Term requirements have deficiencies in the areas of flow and temperature, it provides a significantly greater level of protection and benefits to aquatic life in the Yuba River than that provided under RD 1644 Interim." Based on the CSPA expert witnesses' many years of study of the Yuba River's aquatic resources, it was their opinion that "an action to maintain the recognized significantly inferior flow regimes contained in the RD 1644 Interim would constitute an unreasonable and significant adverse impact to fish and wildlife and other beneficial instream uses and that such a decision is not in the public interest";

2. Testimony followed that "fisheries problems identified on the Yuba River include inadequate fry and juvenile trout and salmon rearing habitat, limited salmon and steelhead out-migrant transportation flows in the Yuba, Feather and Sacramento Rivers, and the Sacramento-San Joaquin Delta, lack of attraction flows for American Shad, and

inadequate water temperatures for fish rearing and spawning and that the fisheries flows provided under RD 1644 Long Term provide significantly greater benefits in every area [for fish] compared to flows under RD 1644 Interim”

3. The lower flows in RD 1644 Interim “can add to passage problems and to the poaching and illegal take of listed Steelhead and Spring run Chinook salmon by concentrating habitat and restricting fish movement.”

4. The “continuation of lower fisheries flows contained in RD 1644 Interim will reduce habitat diversity and complexity by limiting flows to low flow channels and will continue unreasonable reductions in flow-dependent habitat availability for fry and juvenile salmon and steelhead.”

5. The proposed reduction of flows from those contained in RD 1644 Long Term will cause unreasonable adverse impacts to spawning fish entering the Yuba River, both during upstream migration and during spawning and egg incubation. Studies have documented the adverse impacts of elevated temperatures on egg fecundity and survival. Temperature measurements at the Marysville USGS gauge have documented temperatures deleterious to salmon and steelhead. YCWA Exhibit 11.

CONCLUSION

Therefore, the Board should not approve the petition because RD 1644 Interim flows are unreasonably deficient when compared to the fish protections of RD 1644 Long Term. YCWA has included in its application a proposal to implement what they refer to as a Pilot Project to implement the “Yuba River Accord.” The fisheries flows in the Accord [the Pilot Project] are less during some periods than RD 1644 Interim flows and at times provide significantly different and lesser value conditions than the Long Term flows. The Long Term flows are higher than flows in the 2006 Pilot Project flow schedule that is proposed as a substitute. In addition, the Accord and Pilot Project flows are unproven and have been identified as study flows and should not be implemented prior to the completion of the Accord EIS/R next year.

Dated: January 24, 2006

Michael B. Jackson
Attorney for CSPA

PROOF OF SERVICE

I am a citizen of the United States of America and a resident of the County of Plumas, California. I am over the age of 18 years and am not a party to the within entitled action. My business address is 429 W. Main Street, P. O. Box 207, Quincy, California, 95971.

I hereby certify that on January 24, 2006 I served by overnight mail five true copies of the California Sportfishing Protection Alliance Closing Brief regarding the January 2006 Hearing on YCWA Change Petition on the person listed below:

Division of Water Rights
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I hereby certify that on January 24, 2006 one copy of the same documents was served electronically upon the State Water Resources Control Board and upon each of the participants whose e-mail addresses are listed below.

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I certify under penalty of perjury that the foregoing is true and correct. Executed on January 24, 2006 in Quincy, California.

/s/ Ruth W. Jackson
Ruth W. Jackson